SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 126.

MARTHA S. MUNSEY, PLAINTIFF IN ERROR,

v.

M. SWAIN CLOUGH, SHERIFF OF MERRIMACK CO.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an extradition case and comes up on Writ of Error from the Superior Court of the State of New Hampshire.

The facts are as follows:

This plaintiff in error was arrested on March 3, 1902, by M. Swain Clough, the sheriff for the county of Merrimack, State of New Hampshire, upon a complaint and warrant, under Section 1, Chapter 263 of the Public Statutes of that state. Said section and the next two are as follows:

"SECTION 1. Whenever a person in this state is charged with an offense committed in another state, and is liable by the laws of the United States to be delivered over upon demand of the executive of such other state, any court of justice may, upon complaint on oath setting forth the offense and other matters necessary to bring the case within the law, issue a warrant to bring the person so charged before him or some other justice, to answer the complaint.

"SECT. 2. If upon examination there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the executive of this state, he shall, if charged with a capital offense, be committed to jail, there to be detained until a day so appointed as to allow a reasonable time to obtain the warrant of such executive.

"SECT. 3. If a person is charged with an offense not capital, the court or magistrate may order him to recognize, with sufficient sureties, to appear at a day so appointed, and, if he fails to recognize, may commit him to jail, there to be detained not exceeding thirty days, unless sooner discharged by due course of law."

On the same day requisition papers against her were filed with

the secretary of state and on the following day were laid before the governor of the state, Chester B. Jordan.

Counsel appeared for relator and also counsel for the State of Massachusetts, and the governor issued his rendition warrant addressed to the sheriff of Merrimack county, and said Clough took this relator on said warrant into his custody.

On the following day, March 5, she swore out a petition for writ of *habeas corpus*, a copy of which appears on pages 2 and 3 of the printed "Transcript of Record."

On March 8, Judge Charles F. Stone, to whom the petition was addressed, granted the writ, a copy of which appears on pages 2 and 3 of said record.

On March 15, the date named by Judge Stone for a hearing, said Clough made the following return on the back of the writ:

"STATE OF NEW HAMPSHIRE,

"*Merrimack, ss.*

"MARCH 15, 1902.

"*To Mr. Justice Stone:*

"I have here in court the within named Martha S. Munsey, who is now in my custody under a warrant from the governor of New Hampshire on the requisition of the governor of Massachusetts to arrest said Martha S. Munsey and deliver her to Jophanus H. Whitney, as the duly authorized agent of the Commonwealth of Massachusetts; and she has so been in my custody since March 4, 1902, when I received said warrant, a copy of which is hereto annexed.

"M. SWAIN CLOUGH, *Sheriff.*"

At said hearing counsel for relator introduced in evidence, subject to defendant's exception, the requisition papers and made a written motion that she be discharged upon the ground that by her arrest upon said rendition warrant she was deprived of her liberty without due process of law; that on the face of the documents submitted to the governor he was not authorized to issue his warrant and that the warrant was defective.

Copies of the rendition warrant and requisition papers, introduced in evidence, appear in said printed record, pages 6 to 11.

A copy of said motion also appears on pages 11 and 12.

The motion was denied *pro forma*, subject to relator's exception, and the case was transferred to 1902 term of the Supreme Court of the state.

On the 27th day of December, 1902, said court filed an opinion overruling said exception.

A copy of said opinion appears in said printed record, pages 12 to 22, inclusive.

An important paper in the case was known and treated as the Whitney affidavit, a copy of which is as follows:

"COMMONWEALTH OF MASSACHUSETTS,

"Middlesex, ss.

"I, Jophanus H. Whitney of Medford in the County of Middlesex and said Commonwealth, on oath depose and say that Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills as is more fully set forth in the papers hereto annexed, has fled from the limits of said Commonwealth and is a fugitive from justice.

"And I further depose that at the time of the commission of said crime she was in the state of Massachusetts in the county of Middlesex of said Commonwealth, and that at the same time and previous thereto she was a resident of Cambridge in the said county of Middlesex; that she fled from said Commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not now within the limits of the Commonwealth, but, as I have reason to believe, is now in Pittsfield in the State of New Hampshire.

"The grounds of my knowledge are that I have interviewed her since the fourth of November last in Pittsfield, New Hampshire, where she was living with her husband during the last week, January last.

"JOPHANUS H. WHITNEY.

"Then personally appeared the above named Jophanus H. Whitney before me and made oath that the foregoing affidavit by him subscribed is true, this twenty-first day of February, A. D. 1902.

"WALTER C. WARDWELL,
"Justice of the Peace."

Relator's counsel urged that, as this affidavit showed that she fled Massachusetts prior to the date of the offense set forth in the third count in the indictment, she was not present in the state at that time, hence she was not a fugitive from justice as to that offense and could not legally be surrendered to be tried for it.

Relator's counsel also contended that as said affidavit showed her to have fled the state six years and some months subsequent to the alleged commission of the two separate offenses set forth in the first two counts of the indictment, prosecution for said offenses was barred by the statute of limitation of that state, Section 25, Chapter 213, Public Statutes of Massachusetts.

Consequently she was not a fugitive from justice as to the offenses set forth in said two counts because she could not be prosecuted for them at the time she left the state.

Said Section 25, Chapter 213, Public Statutes, reads as follows:

"An indictment for the crime of murder may be found at any period after the death of the person alleged to have been murdered.

"All other indictments shall be proved and filed within six years after the commission of the offense; but any period during which the party charged was not usually and publicly resident within this state shall not be reckoned as part of the six years."

As a result of the Supreme Court overruling the exception named above, the case again came up in the Superior Court on March 28, 1903, before Justice Stone for a further hearing.

At this hearing the relator, subject to the defendant's exception, introduced evidence from which it appeared that when her counsel appeared before Governor Jordan on said March 4, 1902, they stated that they desired a hearing before him before a warrant should be granted on the requisition papers; that counsel for the State of Massachusetts opposed this application on the ground that questions of fact should not be determined by the governor; that relator's counsel then renewed their claim that she was entitled to a hearing upon questions of fact, and in particular upon her claim that she was not a fugitive from justice; that it was pointed out to the governor, by her counsel, that she was already in custody for the purpose of securing her person with a view to extradition; but that the governor refused to hear *any* testimony upon any question of fact and, upon the advice of the attorney-general, issued his warrant upon the requisition papers without *other* testimony than that *contained in those papers.*

At this point the relator then introduced the requisition papers, upon which the rendition warrant was issued, subject to the defendant's exception.

The order of these papers was as follows:

First.—The requisition warrant.

Second.—The certificate of district attorney.

Third.—The certificate of secretary of state, that Albert Mason is chief justice of Superior Court, and Theodore C. Hurd, clerk, and that their signatures to the annexed papers are genuine.

Fourth.—The certificate of Chief Justice Mason to the official character of Clerk Hurd, his custody of the files and record of

the court, his right to certify copies and that his attestation to the annexed papers is in due form.

Fifth.—A copy of the indictment and of the record of its filing in court, verified by the clerk.

Sixth.—A copy of the *capias* writ for the arrest of relator with the return of Walter C. Wardwell, deputy sheriff, endorsed thereon to the effect that he had been unable to find her in his precinct.

Seventh.—A *copy* of the Whitney affidavit, so called, purporting to have been sworn to before Walter C. Wardwell, justice of the peace.

Eighth.—The final and last paper, accompanying the requisition warrant, which was the certificate of the clerk, reading as follows:

"COMMONWEALTH OF MASSACHUSETTS,

"*Middlesex, ss.*

"I, Theodore C. Hurd, clerk of the Superior Court within and for the county of Middlesex, do certify that the foreging papers, numbered one, two, and three, are true copies of the indictment pending in said Superior Court, of the *capias* issued thereon, with the return of the officer thereon, and also the affidavit of said officer filed in said case.

"In testimony whereof I hereunto set my hand and affix the seal of said Superior Court, this twenty-fourth day of February, A. D. 1902.

"THEO. C. HURD,
"*Clerk of Superior Court.*"

None of the foregoing requisition papers were numbered. No affidavit appeared in or among the papers, and no *copy* of one except that of the said Whitney affidavit.

There was no authentication or certification of the official character of Walter C. Wardwell as a justice of the peace before whom the Whitney affidavit purported to have been sworn.

The certificate of the district attorney was *not* under oath, nor was there any authentication, or certification among the papers, of his official character or authority.

The fact that relator was taken into custody on the rendition warrant, petitioned for writ of *habeas corpus* on the fifth and obtained a hearing on the fifteenth also appeared.

At the close of above evidence relator's counsel rested and moved her discharge, which motion was denied, subject to her exception.

She was then *ordered* by the court to proceed and introduce evidence on the question, whether she was in fact a fugitive from justice.

This relator's counsel declined to do on the ground it would constitute a waiver of her right to object to the refusal of the governor to grant her a hearing on this question of fact.

The court then *directed* that counsel state whether she waived the right to then, or at any future time, introduce further evidence upon this or any question of fact, and counsel for relator declared that she did waive that right.

The questions arising upon relator's motion and the foregoing exceptions were reserved, and the case was transferred to 1903 term of the Supreme Court of the state, and the action in the Superior Court was continued to the April term of the court.

On the second day of June, 1903, said court filed an opinion overruling relator's exception, and on the third day of July following, the order of the court was certified to the Superior Court for the county of Merrimack, and on the same day relator filed her objections in said Superior Court to any judgment against her, whereupon judgment was rendered, however, for the defendant.

Your relator then moved for a stay of proceedings pending her application for writ of error.

All the foregoing, including a copy of the opinion of the Supreme Court, appears in detail in said printed record, pages 23 to 32, inclusive.

Subsequently your relator presented a petition containing a statement of the case, and an "assignment of errors," to the chief justice of the Superior Court of the state. Upon which he made the following order:

"Ordered that a writ of error issue according to foregoing petition and assignment of errors upon the execution of a bond with sufficient sureties in the sum of ($1,500) fifteen hundred dollars.

"ROBERT M. WALLACE,

"*Chief Justice of the Superior Court of New Hampshire.*"

The foregoing petition and order thereon were filed in the Superior Court on the twenty-third day of July, 1903, and on September 8th a bond was filed in accordance with above order, and a writ of error was issued and allowed by said chief justice, and citation was served on said M. Swain Clough, sheriff for the county of Merrimack. All which appears in full in said printed record, pages 33 to 41, inclusive, except the writ of error, a copy of which is found on page 1 of said record.

The petition for the writ of *habeas corpus*, which was issued in this case, reads as follows:

"To Hon Charles F. Stone, justice of the Superior Court:

"Respectfully represents your petitioner, Martha S. Munsey, that she is at Concord, in our county of Merrimack, illegally restrained of her liberty by M. Swain Clough, sheriff of the county of Merrimack, who claims to hold your petitioner by virtue of an arrest made in pursuance of an executive warrant issued by the governor of the state of New Hampshire on a requisition from the governor of Massachusetts, reciting that your petitioner stands charged by indictment in said latter state with the crime of uttering forged wills committed in the county of Middlesex on the twenty-eighth day of February, A. D. 1895; on the seventeenth day of May, A. D. 1895, and on the twentieth day of November, A. D. 1901, and was a fugitive from the justice of the latter state.

"Your petitioner avers that she is illegally restrained of her liberty because the proceedings and process upon which the executive warrant was issued by the governor of the state of New Hampshire, are irregular and defective and the evidence filed in support thereof is insufficient, the documentary evidence contradictory and, assuming all the evidence to be true, is not sufficient to warrant the extradition of your petitioner.

"Second. That upon the proceedings filed in the application to the governor upon which the warrant was issued, it appears, and upon evidence to be submitted to a court in a hearing upon the writ of *habeas corpus* prayed for in this petition, it will also conclusively appear that your petitioner is not a 'fugitive from justice' within the meaning of that term as used in the constitution and the acts of Congress relating thereto.

"Third. That your petitioner is not a 'fugitive from justice.'

"Fourth. Because the governor of the state of New Hampshire upon the hearing on the application for the issue of said executive warrant, declined and refused to hear or consider any evidence from your petitioner, or in behalf of your petitioner, upon the question of whether she was a 'fugitive from justice,' or upon any other question, and ruled that the only evidence which he would consider and upon which he based the issuance of said warrant was the documentary evidence offered and filed in support of the requisition made by the governor of Massachusetts.

"Fifth. Because the only evidence considered by the governor of the state of New Hampshire, upon which he issued the warrant on the aforesaid requisition was documentary evidence

filed in support of the requisition of the governor of the Commonwealth of Massachusetts and because he refused and declined to hear any evidence, either documentary or oral, offered in behalf of your petitioner.

"Wherefore your petitioner prays for a writ of *habeas corpus* and that the same may issue to said M. Swain Clough, ordering him to have the body of your petitioner before your honor that she may be released from restraint and granted her liberty, and for such other relief as may be just.

"MARTHA S. MUNSEY.

"MERRIMACK, *ss.*

"MARCH 5, 1902.

"Subscribed and sworn to before me,

"EDWARD A. LANE,

"*Justice of the Peace.*"

SPECIFICATION OF ERRORS.

The following is a specification of the errors claimed and relied upon:

First, That it was error in law to hold that the record evidence, submitted to the governor, justified the issue of his rendition warrant, as it failed to show your relator a fugitive from justice as to *all* the crimes with which she was charged in the indictment on which the extradition proceeding was based, and for which she was demanded.

Second, That it was error in law to hold that the evidence contained in the requisition papers, submitted to the governor, legally authorized a finding by him that your relator was a fugitive from justice as to any one of the crimes with which she was charged in said indictment, and for which she was demanded, and that the rendition warrant was legally issued.

Third, That it was error in law to hold that the documentary, or record evidence, submitted to the governor was competent to be considered by him on the question whether your relator was a "fugitive from justice."

Fourth, That it was error in law to hold that your relator could not be heard, as a matter of right, before the governor, under the circumstance in which she appeared before him, and that his refusal to hear her deprived her of no legal right which she then possessed, and that the governor was authorized to refuse her a hearing and issue his rendition warrant.

Fifth, That all the foregoing holdings of law and the judgment of the Superior Court of New Hampshire, rendered in pursuance thereof, violated the constitutional rights of your relator.

BRIEF OF THE ARGUMENT.

THE RECORD EVIDENCE FAILED TO SHOW THIS RELATOR A FUGITIVE FROM JUSTICE AS TO ALL OF THE SEVERAL CRIMES WITH WHICH SHE WAS CHARGED, HENCE THE RENDITION WARRANT WAS ILLEGALLY ISSUED.

It appeared from the purported copy of the Whitney affidavit, submitted to Governor Jordan by the demanding state, that relator left the state some twenty days before the third offense was alleged to be committed by her, hence, upon the showing of the demanding state, relator was only constructively present in that state at date of said alleged offense. That a person cannot be a fugitive from justice when not personally present in the state where the offense is alleged to be committed, appears to be well settled doctrine. *State of North Carolina* v. *Hall*, 28 Lawyer's Reports, Annotated, 289, and cases there collected; also *People* v. *Hyatt*, 172 N. Y. 176. This doctrine is sanctioned by the New Hampshire court in this case.

As Massachusetts failed to show relator to be a fugitive from justice as to the three offenses alleged to be committed by her, it is not entitled to ask New Hampshire to comply with its demand that it be allowed to take relator there to try her for said three offenses.

A demand that relator be surrendered to be tried and punished for three offenses is not a demand that she be surrendered to be tried and punished for two.

The nature and character of the demand for relator is such that it must be met in its entirety or not at all; Massachusetts did not invoke this process in order to obtain possession of relator to try her for two offenses alleged to be committed, but for three; the rendition warrant issued in legal effect authorized her forcible return for that purpose.

If by this process your relator was extradited to be tried solely for the two crimes alleged to be committed in 1895, then assuming she was a fugitive from justice as to said two, she would have no cause of complaint, but this extradition proceeding was not instituted with any such end in view.

A compliance with this demand recognizes its purpose and object, and deprives this relator of her legal right not to be sent to Massachusetts to be tried for the offense alleged to be committed in November, 1901.

If it were conceded that the object of this process was to take this relator forcibly to Massachusetts, with no ulterior end in view, her extradition would be instantly denied, because there would be no basis for it under Clause 2, Section 2, Article IV, of the Constitution of the United States.

The removal of this relator under this process is a mere incident to the purpose and object of her removal, which is her trial for said three alleged crimes.

The charge, the evidence of fleeing, and the demand, are essential factors in the proceeding; but the process cannot be invoked except for the constitutional object of trying and punishing relator for the particular crimes with which she is shown in such proceeding to be charged.

All the cases appear to go on the assumption that such is the real intent, and a demanded state requires no proof beyond the fact that the demanding state has duly charged relator with the crime or crimes and is seeking his extradition.

In the case at bar, as in all cases of extradition, the purpose of the demanding state to try relator for the *crimes charged* underlies the use of this process.

It is impossible to comply with this demand in part. If surrendered at all, relator must be surrendered in order that she may be put on trial for these three offenses.

If it were possible to divide this demand, or to comply with it in part, to stipulate that New Hampshire should send relator to Massachusetts to be tried for two only of the crimes charged, then, on the assumption that she was a fugitive from justice as to said two crimes, there would appear to be support for the claim that it would be the duty of New Hampshire to send relator there for such trial; but the demand cannot be divided, and it cannot be complied with in part. It must be met in full or declined absolutely.

New Hampshire has no power to stipulate that relator shall be tried for two crimes only, nor to stipulate for her return to New Hampshire after such trial, before she is tried for the third.

Relator has the right to insist upon the protection of the demanded state until it becomes the duty of such state to comply with the demand of the demanding state, and it cannot become a duty to comply with a demand to surrender one of its citizens

to be tried for three offenses until such citizen is shown to be a fugitive from justice as to all three.

It is idle to argue that it is the purpose of Massachusetts to try this relator for only the two crimes charged to have been committed by her in 1895, because the authenticated copy of the indictment which accompanied the demand of the governor shows that she was indicted for the third offense as well as for the other two, and that the three were covered by one indictment. This settles the question of the *intent* attending her extradition.

If it could properly be said that Massachusetts did not ask for her return in order to try her for the offense alleged to be committed in 1901, then it could also be said that it did not ask for her return in order to try her for the two offenses alleged to be committed in 1895, hence it would not be seeking to extradite her for the purpose of a trial at all.

Let us examine the ground on which the New Hampshire court attempts on the foregoing facts to sustain the issue of the rendition warrant.

The language of Justice Walker, who rendered the opinion, is as follows: "But the fact, if it be one, that the relator departed from the demanding state before the commission of one crime alleged in the indictment for which alone she could not be extradited, suggests no reason why she could not legally be returned for other crimes alleged to have been committed there before she left."

It is not our contention that relator cannot be extradited for crimes alleged to be committed in Massachusetts before she left there. On the contrary, we agree with the New Hampshire court that she can be, if as to them she is a "fugitive from justice;" but we urge that the demanding state cannot demand that relator be delivered up to be tried for three crimes until it establishes the fact that she is a fugitive from justice as to those three crimes. In other words, we urge that Massachusetts is not seeking to extradite this relator for the alleged commission of two crimes as to which she may be a fugitive from justice, but is also seeking in this proceeding to extradite her for a crime as to which it is admitted she is not such fugitive, and hence cannot be extradited.

Continuing, Justice Walker says: "The liability that she may be tried on the last count alone, does not exclude her from the class of persons made liable to extradition by the Federal Constitution. She is still 'a person * * * charged with * * * crime.' The question is not whether the governor

might decline to extradite her for that reason, or because he believed the demand was not made in good faith, but whether her rights of citizenship are infringed by her rendition to answer to such an indictment. Neither the constitution nor the statutes upon the subject make an exception of that character. *Lascelles* v. *Georgia,* 148 U. S. 537, 542, 547; *Commonwealth* v. *Wright,* 158 Mass. 149."

Nevertheless, we urge that her rendition to answer to an indictment, charging *crimes* as to which she is *not* a "fugitive from justice," does infringe her right of citizenship, and that neither the constitution nor the statutes authorize such rendition.

The above two cases cited by the court are not in point.

In both cases accused had already been extradited, and the question was, whether the constitution and the statute on the subject secured to him a right to return as against the claim of the state to detain him to answer for other crimes. The court simply held that such right was not secured to him, but it did not hold that a man could be charged with half a dozen offenses in one indictment, and, without infringing his right of citizenship, be extradited to answer to them all, upon evidence that as to one of them only was he a "fugitive from justice."

The opinion on this branch of the case closes by the use of the following language: "If the indictment upon which this proceeding is based had contained only the first count, but it appeared that another indictment containing the other counts was pending in the same court, that fact would not prevent the rendition of the prisoner, though the question in legal effect would be substantially the same as is presented here."

We dissent from the proposition "though the question in legal effect would be substantially the same as is presented here," because the court assumes that if this relator had been indicted for only the one offense alleged to be committed in February, 1895, and was shown to be a "fugitive from justice" as to that offense, the question of her extradition would, in legal effect, be the same as that now presented, whereas a *vital* difference exists. In the *assumed* case, she is shown to be a fugitive from justice as to the offense for which she is indicted and demanded, while in the case at bar the demanding state *fails* to furnish evidence that she is a fugitive from justice as to all of the several offenses for which it indicts and seeks to extradite her.

In above illustration it is assumed that another indictment containing the other counts is pending in the demanding state

in the same court; but how can that have any bearing on the question?

If there were now another indictment pending in the same court in Massachusetts against this relator for other crimes alleged to be committed there, as to which it were admitted she was not a fugitive from justice, what bearing could that fact have, either one way or the other, on the question now before the court?

Neither the purpose of this process nor the nature of the demand made is altered by the success or non-success of the demanding state in maintaining the affirmative of the issue, that as to all the crimes charged relator is a "fugitive from justice."

Since in the case at bar the provisions of Article IV, Section 2, of the Constitution of the United States do not secure to relator a right to return after she is tried for the first two crimes charged, and before she can be tried for the third, it is especially incumbent on New Hampshire not to comply with the demand that she be surrendered to be tried for each and all of the crimes charged until she is shown to be a "fugitive from justice" as to each and all.

In commenting on the case of *Lascelles* v. *Georgia,* 148 U. S. 537, the court in *People* v. *Hyatt,* 172 N. Y. 182, say:

"It was there held that interstate rendition did not depend on comity or contract, but on the provisions of the Constitution of the United States.

"It will then be seen that the condition of a citizen of one state surrendered to another for criminal prosecution has not the safeguards which exist in international extradition, for the surrendering state is without any standing to intervene in his behalf, however much its process may be abused.

"Therefore, it necessarily follows that no person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity, is not possessed by the states."

A construction of Clause 2, Section 2, Article IV, of the Constitution of the United States which should require this relator to be surrendered up, under the circumstances of this case, relieves the demanding state of the burden thrown upon it by the express language of said Clause 2, namely: The burden of showing relator to be a "fugitive from justice" as to the *crimes* which it charges against her.

By setting up these three offenses in one indictment and ask-

ing New Hampshire to send relator there to answer to them all, Massachusetts elected to treat her as a fugitive from justice as to them all, and having elected its position, it must stand or fall accordingly.

It is true Section 2, Article IV, of the Constitution of the United States, does not provide for the return of accused, after extradition before trial for another offense than the one for which he was extradited, but it is also true that said provison was not intended to deprive him of his right to remain unmolested in the demanded state on account of an alleged offense as to which he was *not* a fugitive from justice. It was not intended to enable the demanding state to join in one indictment a count for such non-extraditable offense with a count for another as to which accused was such fugitive and thereby demand and compel his return to answer to both counts in one trial.

Neither was said constitutional provision intended to embarrass one in his defense to the charge of being a fugitive from justice by enabling the demanding state to join said two counts in one indictment, and thereby create, at the extradition hearing, two issues instead of one, the holding of either against accused resulting in his extradition to answer to both counts.

According to the view of the Supreme Court of New Hampshire, the question presented to Governor Jordan was, Is this relator a fugitive from justice as to *any one* of the different offenses charged in this indictment?

An affirmative answer to same required him to issue his rendition warrant.

Whereas the true question was, Is this relator a fugitive from justice as to *all* the offenses charged, for which she is demanded for trial?

Thus raising one issue instead of several.

The constitutional provision and the statutes on the subject authorize the governor to issue his rendition warrant only when accused is shown to be a fugitive from justice as to the offenses charged in such extradition proceeding; therefore, is it not clear that his authority is exceeded when he issues a warrant for the return of accused to be tried for a crime as to which it is admitted he is not such fugitive?

It should be borne in mind that it is not sufficient to show that accused has fled the state as to some crime, but that he has fled the state on account of the *particular crimes* with which he is shown, in the extradition proceeding, to be charged and for which he is demanded for trial.

The executive of the demanding state cannot legally ask that its demand be granted until it is first shown that accused is a fugitive from justice as to the crimes for which he is so demanded; therefore, if the state's demand is pressed, that accused be surrendered to be tried for two offenses when it appears that he is a fugitive from justice as to one only, the effect is to ask the governor of the demanded state to *exceed* his authority.

Let us refer again to the language of the court in discussing this branch of the case:

"If the indictment, upon which this proceeding is based, had contained only the first count, but it appeared that another indictment containing the other counts was pending in the same court, the question in legal effect would be substantially the same as is presented here."

We submit that the question in legal effect would not, and could not, be substantially the same as that presented here, because in above illustration the indictment used as the basis for the proceeding would *not* contain the count in question, viz.: the count for the offense alleged to be committed November 20, 1901, but only the count for the offense alleged to be committed February 28, 1895.

The process of extradition must rest *entirely* upon the indictment on which it is based, and can have no connection with another indictment, even though the latter be pending in the same court of the demanding state.

When one indictment is used as the basis of the extradition proceeding, evidence of the pendency of another in the same court cannot be received by the governor of the demanded state.

In above illustration used by Justice Walker, relator, if extradited at all, is legally extradited to answer to the indictment containing the one count, as that indictment is the one used as the basis for the extradition process against her.

She could not, and would not, be extradited to answer to any other. We frankly admit that when accused is once shown to be a fugitive from justice as to the crime charged in the particular indictment used as the basis of his extradition, it cannot be shown in evidence, as a cause for not surrendering him to answer to said indictment, that still another is pending in the same court charging a crime as to which he is *not* such fugitive.

This must be so because accused would not, in the eye of the law, be extradited to answer to any offense except that charged in the particular indictment used as the basis of his extradition.

It must also follow that when accused is *not* shown to be a

fugitive from justice as to the one crime charged against him, it cannot be urged as a cause for his removal, nor shown in evidence, that another indictment is pending in the same court charging a crime as to which he is such fugitive.

This must be so for two reasons. First, because the latter indictment, though pending in the same court, is not used as the basis of his extradition. Second, if it were so used, the same legal question would be presented as is presented in the case at bar, accused though shown to be charged with two crimes would be shown to be a fugitive from justice as to one only.

We close the discussion of this branch of the case with the additional suggestion that the record evidence in this case, for the reasons hereafter urged, failed to show this relator a fugitive from justice as to either of the first two crimes charged in the first two counts in the indictment, consequently the demanding state failed to show her a fugitive from justice as to *all* of the several crimes with which it charged her in its indictment, and the rendition warrant was illegally issued.

THE EVIDENCE CONTAINED IN THE REQUISITION PAPERS DID NOT AUTHORIZE A FINDING BY THE GOVERNOR THAT THIS RELATOR WAS A FUGITIVE FROM JUSTICE AS TO ANY ONE OF THE THREE CRIMES CHARGED AGAINST HER, CONSEQUENTLY THE RENDITION WARRANT WAS ILLEGALLY ISSUED.

The record evidence bearing on the question of whether relator was a fugitive from justice was embraced in the so-called "Whitney affidavit," which in full is as follows:

"COMMONWEALTH OF MASSACHUSETTS, ..
"*Middlesex, ss.*

"I, Jophanus H. Whitney of Medford, in the county of Middlesex and said commonwealth, on oath depose and say that Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills, as is more fully set forth in the papers hereto annexed, has fled from the limits of said commonwealth and is a fugitive from justice. And I further depose that at the time of the commission of said crime she was in the state of Massachusetts, in the county of Middlesex of said commonwealth, and that at the same time and previous thereto, she was a resident of Cambridge, in the said county of Middlesex; that she fled from said commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not

now within the limits of the commonwealth, but, as I have reason to believe, is now in Pittsfield, in the state of New Hampshire. The grounds of my knowledge are that I have interviewed her since the fourth of November last in Pittsfield, New Hampshire, where she was living with her husband during the last week of January last.

"JOPHANUS H. WHITNEY.

"Then personally appeared the above named Jophanus H. Whitney before me, and made oath that the foregoing affidavit by him subscribed is true, this twenty-first day of February, A. D., 1902.

"WALTER C. WARDWELL,
"Justice of the Peace."

The above affidavit was not evidence that she was a fugitive from justice as to the offense charged in the third and last count in the indictment, for the reason already fully stated.

It also was not evidence that she was such "fugitive" as to the separate offenses charged in the first two counts.

This affidavit begins by asserting,

"That Martha S. Munsey * * * has fled from the limits of said commonwealth and is a fugitive from justice." Here is a statement of fact followed by a conclusion of law.

If the affidavit had stopped there it would have been somewhat analogous to the one in *Ex parte Reggel*, 114 U. S. 642, 647, but affiant proceeds to state the facts upon which his conclusion rests.

"And I further depose that at the time of the commission of *said crime* she was in the state of Massachusetts, in the county of Middlesex of said commonwealth, and at the same time and *previous thereto* she was a resident of Cambridge, in the said county of Middlesex; that she fled from said commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901."

From the foregoing it appears that the words "said crime" refer to the "crime of uttering forged wills, as is more fully set forth in the papers hereto annexed."

It also appears that "at same time and *previous* thereto," viz.: when uttering said forged wills, "she was a resident of Cambridge, in the said county of Middlesex."

In other words, at the time of the alleged commission of each crime, and previous to each, she was a resident of said Cambridge.

At this point, however, affiant negatives the idea that relator

was personally in said county of Middlesex on November 20, A. D. 1901, by using the following language:

"That she fled from said commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901."

Affiant evidently considered that relator's departure from the state on or about the fourth did not necessarily deprive her on the twentieth of her legal status as resident of said Cambridge.

Here, then, we have unequivocal evidence from the demanding state that this relator was a resident of that state at the time of the alleged commission of the first two crimes charged, and so continued until November, 1901, when she fled the state.

The statute of limitation in force in Massachusetts in November, 1901, reads as follows:

"An indictment for the crime of murder may be found at any period after the death of the person alleged to have been murdered. All other indictments shall be found and filed within six years after the commission of the offense; but any period during which the party charged was not usually and publicly resident within the state shall not be part of the six years." Public Statutes of Massachusetts, Chapter 213, Section 25.

As in November, 1901, prosecution was barred, she could not be a "fugitive from justice" as to said two crimes, because she was not "charged with crime" within the meaning of the clause of the Federal Constitution providing for extradition (U. S. Const., Article IV, Section 2), which is always interpreted as requiring a *lawful charge of crime punishable by the law of the demanding state.*

The statute of limitation in criminal actions is not a matter of defense in Massachusetts; it is a part of the affirmative case of the prosecution to prove that the offense is not outlawed.

If an indictment should allege an offense committed more than six years before the date of the indictment, without an allegation of non-residence during the intervening period, it would be bad on demurrer, but Justice Walker, in delivering the opinion of the Supreme Court of New Hampshire, says:

"It," referring to the Whitney affidavit, "does not necessarily establish the proposition as claimed by her that during all that time she was 'usually and publicly resident' (Mass. P. S., Chapter 213, Section 25) in the state, if it did it would become necessary to consider the question whether under those circumstances she could be a fugitive from justice within the meaning of the law of extradition."

The answer to above is, that as the affidavit was direct evidence that she was a resident of Cambridge, Massachusetts, the

necessary presumption was that she was "usually and publicly" a resident thereof, hence, the bar of the statute applied.

In other words, it was not necessary, in order to raise the bar of the statute, for the state's evidence to preclude the *possibility* that relator was not, during the term of her residence in Cambridge, a usual and public resident thereof, because the evidence having on its face established her residence there, and the term thereof, the bar of the statute was raised unless the character of her residence was such as to bring it within an exception named in the statute, and as that did not appear, the statute applied.

The Whitney affidavit was *prima facie* evidence that she was, after the alleged commission of said two crimes, a resident of Cambridge for six years and several months prior to November, 1901.

On the facts disclosed the statute applied because the affidavit of Whitney brought the case within its general terms and did not negative its operation by any evidence that the case fell within an exception thereto.

But there seems to be a suggestion in the opinion rendered by the Supreme Court of New Hampshire that the Whitney affidavit did not furnish *prima facie* evidence that relator was entitled to the protection of the statute because affiant swore that relator was a "fugitive from justice."

We submit that the question of the residence of this relator in Massachusetts from February, A. D. 1895, to November, 1901, and its character, is not determined by the isolated expression of a legal conclusion in this affidavit, but upon a fair consideration of all that appears therein.

Affiant starts out with above conclusion, and then states the facts upon which it rests.

The legal conclusion does not control the facts, but the facts the conclusion.

In other words, the legal conclusion rests on the facts and not the facts on the conclusion, and in this case the latter is not *supported* by the former.

It must not be forgotten that the affidavit in this case was not offered by this relator to show she was *not* a fugitive from justice, but was offered by the demanding state to show she *was*.

The situation was this: The state attempted to prove that this relator in November, 1901, fled to escape from a prosecution to which she was then legally subject because of the alleged commission of the two crimes named in the first two counts in the indictment; but its evidence failed to prove her legally

subject to said prosecution because of the statute of limitation. The fact that the statute contained within itself an exception to its operation was immaterial because no evidence was offered by the state to bring the case within the exception.

The question presented to the governor was, Was this relator a fugitive from justice as to said two crimes when she is alleged to have "fled"?

She was such fugitive if she was then subject to prosecution therefor, otherwise not; hence, in view of the statute of limitation the answer to above question turned on the query, Does this affidavit afford any evidence that said statute was not operative in this case? In other words, does it appear that during any portion of the period following the alleged commission of said two crimes, and ending in November, 1901, this relator was *not* usually and publicly a resident of Cambridge, Massachusetts?

There was no such evidence, consequently the finding made, that relator was such fugitive, was not supported by the evidence.

We desire to call the attention of the court to the criminal statute of limitation in New Hampshire, which is in line with that of Massachusetts, and is as follows:

"Indictments and prosecutions for offenses punishable by fine not exceeding one hundred dollars, or by imprisonment not exceeding six months, shall be found or begun within one year, and all other information and indictments, except for treason, murder, rape, arson, robbery or burglary, shall be filed or found within six years after the offense is committed; but the time during which the party charged was not usually and publicly resident within this state, shall not be reckoned as part of the time aforesaid." Public Statutes of New Hampshire, Chapter 253, Section 14.

For decisions thereon see *State* v. *Nashua & Lowell R. R.*, 58 N. H. 182; *State* v. *Havey*, 58 N. H. 377, 380; *State* v. *Ingalls*, 59 N. H. 88; *State* v. *Caverly*, 51 N. H. 446.

On the point that concealing a crime will not prevent the running of the statute, see *State* v. *Nute*, 63 N. H., 80, opinion by Allen.

We close this branch of the case with the final suggestion that the Whitney affidavit was offered to prove, among other things, that although relator was charged with crimes committed more than six years apart, yet that prosecution for any of the crimes was not barred because the statute of limitation did not run against such prosecution, but as it failed to establish

that fact it failed to show relator a fugitive from justice as to all of the several crimes charged.

As, on the evidence, she did not leave the state for more than six years after the alleged commission of the first two crimes, it was encumbent on the state to prove that the statute did *not* run in order to show her a fugitive from justice as to said crimes.

In other words it was incumbent on the state to prove that she was not usually and publicly a resident of Cambridge, Massachusetts, and not for her to prove that she was.

IT WAS ERROR IN LAW TO HOLD THAT THE EVIDENCE SUBMITTED TO THE GOVERNOR WAS COMPETENT TO BE CONSIDERED BY HIM ON THE QUESTION OF WHETHER THIS RELATOR WAS A "FUGITIVE FROM JUSTICE."

The so-called *copy* of an affidavit which accompanied the requisition papers was incompetent evidence to be considered by the governor on the question whether relator was a fugitive from justice.

If a foreign affidavit was admissible evidence it should have been produced, as it was the best evidence.

It being in the possession of the demandant state, which relied upon it to establish its claim that relator was a "fugitive from justice," it should have been produced, and relator had a right to insist upon it.

No reason appears, or is offered, for substituting a copy for the original. By this action relator was deprived of her legal right to inspect the original, and to prove, if within her power, that the signature of affiant and the person, before whom it purported to be executed, were not genuine.

An examination of the statutes of New Hampshire, as well as the statutes of the United States, show that no statute exists authorizing the use of this *copy* as evidence in case like this.

This copy was among, but not one of, the documents accompanying the requisition of the governor of Massachusetts which he certified to be authentic and duly authenticated.

Let us examine the language of the requisition warrant on this point. "Whereas it appears by *certain* documents, which are hereunto annexed, and which I certify to be authentic and duly authenticated, in accordance with the laws of this commonwealth, that Martha S. Munsey stands charged with the crime of uttering forged wills."

Omitting the relative clauses, the quoted language stands as

follows: "It appears by certain documents that Martha S. Munsey stands charged with the crime of uttering forged wills."

The relative clauses point out that said *certain* documents, which *prove* the existence of the charge, are annexed, are authentic and have been duly authenticated in accordance with the law of Massachusetts.

It is apparent on examination that this *copy* of an affidavit does not prove the existence of the charge against Martha S. Munsey, but merely refers to annexed papers which do.

Said copy is one of the papers annexed to the requisition warrant, but so is the certificate of George A. Sanderson, which is not certified to be authentic, or intended to be so certified by the language quoted.

We quote from the printed record, page 27, as follows:

"The certificate of the district attorney is not under oath, nor is there any authentication, or certification among the papers, of his official character or authority."

In using above language in his requisition warrant the governor intended to discharge the duty imposed on him by Section 5278 of the Revised Statutes of the United States, and its meaning should be construed in the light of the duty to be performed.

Furthermore, as the authority of the governor to authenticate was based on said Section 5278, and did not extend beyond the power there given, he had no authority to authenticate this copy.

Is it not plain that its original, if such exists, must be on file either in the office of the secretary of state for the state of Massachusetts or in the office of the clerk of the Superior Court in and for the county of Middlesex, in said state?

In either case it was the duty of the person in whose care and custody is the original, to verify the copy in any case in which the latter can be used.

It will not be claimed that the secretary of state verified this copy in any manner.

Neither can it be claimed that the governor verified it, because he expressly pointed out which of the documents annexed to his requisition warrant he intended to verify, and did verify.

We again refer to his language: "Whereas it appears by *certain* documents which are hereunto annexed, and which I certify to be authentic and duly authenticated, in accordance with the laws of this commonwealth." Note the language, "Which I certify to be authentic and *duly authenticated*."

Which of the annexed documents are "duly authenticated"?

Certainly not the certificate of Mr. Sanderson nor this copy of an affidavit.

We quote from page 26 of the printed record, as follows:

"Then follows a certificate of Chief Justice Mason to the official character of the clerk, Hurd, his custody of the files and records of the court, his right to certify copies of such files and records, and that his attestation to the annexed papers is in due form."

In order to learn which of the annexed papers are "duly authenticated" let us now turn to the certificate of Clerk Hurd, which is as follows: "I, Theodore C. Hurd, clerk of the Superior Court within and for the county of Middlesex, do certify that the foregoing papers, numbered one, two and three, are true copies of the indictment pending in said Superior Court, of the *capias* issued thereon, with the return of the officer thereon, and also the affidavit of said officer filed in said case.

"In testimony whereof I hereunto set my hand and affix the seal of said Superior Court, this twenty-fourth day of February, A. D. 1902.

"THEO. C. HURD,
"Clerk of Superior Court."

This certificate leads one to inquire what officer made the return on the *capias* writ, because after referring to the return of the officer thereon the clerk adds, "And also the affidavit of said officer filed in said case." On said page 26 of the printed case we find the following: "The next paper is a copy of the *capias* writ for the arrest of the relator, with the return of Walter C. Wardwell, deputy sheriff, endorsed thereon, to the effect that he has been unable to find her in his precinct."

This examination demonstrates the fact that the clerk attempted to verify a copy of the affidavit of Walter C. Wardwell, but the following from said page 26: "The only copy of an affidavit contained in the papers is that of Jophanus H. Whitney," proves that a copy of an affidavit by Wardwell, if such existed, did not accompany the requisition warrant.

It is reasonable to suppose if Wardwell made an affidavit it was to the truth of his return on the *capias* writ.

From all the foregoing it is apparent that a claim that Clerk Hurd verified the Whitney copy as a true copy of the original, or that it was in any manner "duly authenticated," cannot be sustained.

The fact is that no officer in whose care and custody is the original, verified the copy.

Our claim is that an unverified copy of a foreign affidavit was not competent evidence for the demanded governor to consider

on the question of fact whether this relator was a fugitive from justice.

We suggest in passing that if this original were on file in said Superior Court and the copy had been specially certified as a true one by Clerk Hurd, even then it would not have been competent evidence for the demanded governor to consider on the question of "flight," so far as the authentications of Hurd was concerned, because an affidavit filed in court in a proceeding in which the court did not *have* jurisdiction of relator's person could not be such a court record as would entitle a certified copy thereof to be used in another state as evidence against relator in a matter affecting his personal liberty. The original affidavit so on file in the office of Clerk Hurd would not constitute such a judicial proceeding, or any part of such a judicial proceeding, nor such part of the record of the court as is contemplated by Section 1, Article IV, of the Constitution of the United States. *Baltimore etc. R. Co.* v. *Trustee, etc.*, 91 U. S. 127-130; *Roanoke Land etc. Co.* v. *Hickson*, 80 Va. 589-591; *D'Arcy* v. *Ketchum*, 11 (Howard) U. S. 165.

But assuming, as the Supreme Court of New Hampshire does assume, that this copy is a copy of "the sworn proof required by the statute of Massachusetts to be there filed with the governor," the question before the court is, Can an unverified, unauthenticated copy of a piece of evidence, on file in an executive proceeding in another state to which relator was in no way a party, be competent evidence against him in a matter affecting his personal liberty?

We submit that the affirmative of this proposition cannot be matched in any case bearing on the question of the competency of evidence in the judicial history of this country.

In addition to the foregoing reasons we urge that this copy was not competent evidence before the demanded governor because its original would not, for the following reasons, have been competent:

First, This copy shows its original was not under the seal of any court nor of any notary public, and the authority of the justice of the peace, before whom the original purported to have been executed, was in no way authenticated.

Second, The oath administered in the original affidavit was not administered under such circumstances as carried with it in the extradition proceeding before the demanded governor the penal consequences of false swearing.

The original was not used before the demanded governor, and evidently was not taken *to be so used*, and the actual use of a

mere unverified, unauthenticated copy could not subject affiant in any state to the penal consequences of false swearing. Had the original been so used it could not have subjected affiant in New Hampshire to the penal consequences of false swearing because the oath was not administered in that state, but in Massachusetts by one purporting to be a justice of the peace of the latter state. *Gibson* v. *Tilton*, 17 American Decisions 306.

THE COPY OF INDICTMENT WAS NOT COMPETENT EVIDENCE.

We contend that the authenticated copy of the indictment was also incompetent evidence before the demanded governor on the question of whether relator was a "fugitive from justice."

This copy proved that the *charge* of crime existed because Section 5278, Revised Statutes of the United States, provided that it should have that effect, but it proved nothing more.

None of the grand jury had personal knowledge of any facts set forth in the indictment. How, then, could a *copy* thereof be competent evidence of such facts?

If the indictment, when found, is not evidence of the facts it alleges when those facts are directly in issue (and this will not be denied) how in a foreign state can a copy thereof be evidence of facts alleged therein which are not admitted and which bear on the question of personal liberty of accused?

It may be urged in answer that the governor, having authenticated the copy of the indictment, the facts therein are established.

The fallacy of this answer consists in the false assumption that the allegations in the indictment are proved by said authenticated copy. The only fact established is the existence and character of the *charge* of crime.

As the demanded state has not jurisdiction to determine the truth or falsity of the charge, evidence offered for the *purpose* of proving either is not admissible on *habeas corpus*.

It is not the *guilty* person charged with crime who may be demanded, but the *person* charged with crime, whether guilty or innocent, provided he has fled from prosecution.

As suggested Section 5278, Revised Statutes of the United States, provided that the authenticated copy of the indictment should have the effect of proving the nature and existence of the charge of crime, but it provided and intended nothing more. How then can such authenticated copy have a greater effect as evidence than the statute intended which created it a piece of evidence?

In the case of *ex parte* Swearingen, 13 South Carolina, the court, in discussing the question whether the fact that relator was a "fugitive from justice," should be made to appear to the demanded governor before the issue of the rendition warrant, on page 79, uses the following language:

"If, therefore, it is necessary that such fact shall be made to appear, it certainly is not essential that it shall be proven by an *affidavit certified by the governor of the state making the de*mand as authentic. Indeed, the governor's authentication of such an affidavit would have no force and effect here, as that is not the mode prescribed by law for the authentication of the records and judicial proceeding of another state, and the only reason why the governor's authentication of the indictment or affidavit showing that the person demanded is charged with crime is sufficient, is that it is expressly so provided by the act of 1793. It follows, therefore, that if the fact that the person demanded is a fugitive from justice must be proven, it must be by some evidence other than that which would be furnished by an affidavit authenticated by the governor of the state making the demand."

When, in a foreign state, a governor is called upon to perform the judicial duty of determining whether accused is a fugitive from justice, it ought to be fundamental that the copy of the "*charge* of crime" is not evidence of what it alleges.

We are aware, however, that it has been held in some cases that when the offense charged necessarily implies the actual presence of accused within the jurisdiction of the demanding state at the time of its alleged commission, he properly held on the rendition warrant. The cases of John Leary, 10 Benedict United States District Court Report, 197, and of *ex parte* Swearingen, 13 South Carolina, 74, are of this class.

It seems, however, that these cases proceed on the fallacy that the authenticated copy of the "charge of crime" proves something more than its mere existence and character.

This fallacy tends to confusion, as witness above case of *ex parte* Swearingen. The majority opinion in that case declared, as we have seen, that an affidavit certified as authentic by the demanding governor, which showed relator to be a "fugitive from justice," would be incompetent evidence on that question before the demanded governor. See page 79 of the opinion. The court then declared that the *copy* of the affidavit in the case containing the charge of crime duly authenticated by the demanding governor, was *prima facie* evidence that accused was

in the demanding state at date of alleged commission of crime charged.

The question naturally arises how a court could hold that a separate affidavit authenticated by the demanding governor, declaring relator to have been in the demanding state at date of the commission of crime charged, is incompetent evidence on the question whether accused is a fugitive from justice and *yet that a copy of an affidavit so authenticated charging the* crime itself, is competent evidence on that question.

This confusion arises from not limiting the authenticated charge of crime as a piece of evidence to the purpose intended by said Section 5278, Revised Statutes.

But above cases are not in point here, for in the case at bar it is self-evident that the crime of "uttering forged wills" does not necessarily imply the actual presence of accused in the demanding state.

Constructive presence there is perfectly consistent with the allegation of crime laid in the indictment.

A petition to prove a will can readily reach the probate court by the action of the accused without personal presence in the demanding state.

It cannot be claimed here by the demanding state that the indictment is evidence of the *actual presence* of accused in that state on November 20, 1901, because it has been its contention up to this point, and still is as we understand it, that there was competent evidence before the governor to show her flight sixteen days before that date.

We do not anticipate that, under the rules of evidence, the Supreme Court of the United States will ever hold that a copy of a charge of crime, made in a foreign state by an *ex parte* tribunal before whom accused had no power or right to be heard, can be received as evidence against him in a matter involving his personal liberty; nor, that under the rules of evidence, it will be claimed in this case that the unsworn, unauthenticated certificate of George A. Sanderson, addressed to the governor of Massachusetts, was competent evidence to be considered by Governor Jordan in the discharge of his judicial duty of determining whether this relator was a "fugitive from justice."

But the Supreme Court of New Hampshire held that "legal rules prescribing the competency of proof do not, in the absence of statute, govern the admission of evidence in extradition proceedings, except so far as the executive may see fit to adopt them."

In the case at bar no statute pointed out the character of the evidence to be received by Governor Jordan; he was, therefore, according to this decision, exempt from any obligation to observe any rule of evidence. In other words, in the discharge of his judicial duty in this respect, he was a law unto himself.

On the ground that he was legally guided by no rule of evidence the court held that he was justified in receiving in evidence a copy of the Whitney affidavit and treating it as worthy of credit, although in the language of the court, "The copy of an affidavit would not answer the requirements of legal proof in a court of justice; and the same is true of the original affidavit."

In discussing the question of the discharge by the governor of his judicial duty in this respect, the court say:

"As the governor should not have issued his warrant without proof that the accused was a fugitive from justice, it is argued that the record evidence was incompetent and insufficient to warrant such a finding. But the character of proof essential to establish the fact is not prescribed by the act of Congress * * * or the statute of this state; it appears to have been the policy of Congress and of the Legislature to permit the chief executive to determine the question upon such proof as seems to him worthy of credit."

We earnestly contend that it was not the policy nor the intention of Congress nor the Legislature to invest the governor with arbitrary power to decide what proof he should receive, that the statute must be construed in the light of constitutional provisions protecting from infringement the personal liberty of the citizen, hence, that while the governor may determine the question upon such "proof as seems to him worthy of credit," it must be upon such *competent* proof, such *legal* proof, as "seems to him worthy of credit."

The Supreme Court of New Hampshire has held in this case that relator can review in a court of justice the finding, made against her by the governor based on non-legal proof, and "If his finding of fact in this respect is erroneous the prisoner is unlawfully restrained of her liberty and is entitled to be discharged."

It is self-evident that on such review the prisoner is restricted to legal proof to rebut a finding based on *non*-legal proof.

In other words the finding that she is a fugitive from justice is based on a different class of evidence from that allowed her in rebuttal on her rendition hearing in court.

Is not this situation repugnant to one's natural sense of justice and to his legal sense of due process of law?

We have thus far been unable to find any case deciding the exact question here involved, but we have found more or less discussion as to the character of the proof essential to establish before the demanded governor the fact that accused is a fugitive from justice, and we find no warrant in the tendency of this discussion for the doctrine that the governor in deciding what proof he shall receive is a law unto himself and can receive legal or *non*-legal proof as he chooses.

In the case of *ex parte* Swearingen, 13 S. C., to which we have already referred, Chief Justice Willard in a strongly written dissenting opinion makes the following observations on the character of the evidence presented to the demanded governor in that case:

"The process under which it is sought to deprive the relator of his liberty is in derogation of the common law, and every fact necessary to warrant it is jurisdictional, and must be both alleged and proven. The competency of the proof must be determined by the laws of this state, where there is no conflicting rule established by competent authority displacing these laws.

"The only evidence on the part of the demandant state to which our attention has been called for the purpose of proving that the relator had fled from justice, is contained in the affidavit taken in Georgia before a magistrate of that state, which constitutes the charge made against the relator in the criminal court of Georgia, a copy of which only is before us, having been transmitted by the governor of Georgia. It is clear that a copy of an affidavit sworn in the state of Georgia before a person not competent to administer an oath, so as to make competent testimony to be used before the courts of this state, is, in itself, incompetent proof of any fact on which the liability of the citizen depends in the courts. Before testimony can subserve such a purpose, it must, except in a restricted class of cases, to which the present does not belong, be given under the sanction of an oath, carrying with it the penal consequences of false swearing.

"The proof in question can only be received where it is made such by competent authority.

"It will not be pretended that the act of Congress makes the copy of the indictment or affidavit transmitted by the demandant state proof of any fact beyond that, that the relator has been charged with crime in the state of Georgia. * * *

"In my judgment it was for the demandant state to affirm and establish the fact that the relator had fled from justice, and if it be true that the relator has not traversed that fact, that cir-

cumstance is immaterial, as he was not bound to traverse it until it was alleged in a competent manner.

"One cannot be prejudiced by his silence except when the law compels him to speak, and the relator had a perfect right to remain silent and cast upon the demandant state the onus of showing its right to interfere with his liberty. * * *

"In my judgment there is not competent proof to warrant the surrender of the relator to the public authorities of the state of Georgia."

In the case of *re* Jackson, 2 Flippin, 183, the Court, on page 186, uses the following language:

"Now it is manifest that before the executive of Michigan is authorized to issue his warrant to cause to be arrested and secured, a person charged in another state with crime, it should be shown by evidence making a *prima facie* case that such person has fled from the demanding state. This should be shown by *competent* evidence, as the fact of fleeing lies at the foundation of the right to issue a warrant of extradition. The certificate of the demanding governor is no evidence of the fact. Neither the act of Congress nor any rule of evidence makes his certificate evidence of such fact. The act of Congress makes it the duty of the executive of the state 'to which such person has fled' to cause him to be arrested and secured.

"The mere fact that a citizen of Michigan has been charged with crime and indicted in another state is not legally sufficient to authorize the arrest and extradition of such a citizen. He may be charged with crime, and indicted in a state into which he has never entered or was never in, and from which, therefore, he never fled.

"It is as essential to the right of arrest and extradition to prove to the satisfaction of the governor of Michigan that the person charged with crime has fled from justice, as to prove that he is charged with a crime in such other state.

"The latter is sufficiently proved in either of the two methods provided by the law of Congress; by copy of an indictment, or by an affidavit made before some magistrate, charging the person demanded with having committed a crime certified as authentic by the demanding governor.

"No provision is made as to the method of proving that the person demanded as a fugitive has fled from justice.

"But when the constitution says a person charged with crime, 'Who shall flee from justice' shall be delivered up, the converse is that a person charged with crime, who shall not have fled from justice, shall not be delivered up to be removed.

"Hence, it is essential that it be shown that the accused is a fugitive from justice. * * *

"The evidence that the person has fled from justice must not only be satisfactory to the governor, but must be *legally sufficient* before the executive authority can be exercised.

"He cannot act upon rumor nor upon the mere representation of a person, nor upon the demanding governor's certificate.

"It should be *sworn* evidence, such as will authorize a warrant of arrest in any other case."

In *People* v. *Hyatt*, 172 New York 176, the court, on page 189, says: "The act of Congress provides that a copy of the indictment or the affidavit before a magistrate shall be proof of the charge of crime against any person whose extradition is sought, but it does not prescribe what shall be evidence that he is a fugitive from justice. The fact that he is a fugitive is, therefore, a matter of proof."

In the matter of Reggel 114, U. S. 651, it was said by Justice Harlan: "The appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction so that he could not be reached by her criminal process. * * * Upon the executive of the state in which the accused is found rests the responsibility of determining, in some *legal mode*, whether he is a fugitive from the justice of the demanding state.

"He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him by *competent* proof, that the accused is, in fact, a fugitive from the justice of the demanding state."

It is true that Justice Matthews, in *Roberts* v. *Reilly*, 116 U. S., in referring to the duty of the governor in this particular, suggests that the latter must decide this question of fact "upon such evidence as he may deem satisfactory," but we do not understand him to mean that the governor can decide upon incompetent, illegal, unsworn evidence, nor upon an unverified copy of a piece of evidence used in an *ex parte* foreign proceeding.

If that is the case, the liberty of accused necessarily rests for all practical purposes upon the arbitrary will of the demanded governor.

It may be that it is proper to submit to the demanded governor evidence of the flight of accused in the form of an affidavit or affidavits whenever the latter does not appear and ask for a hearing, but if so, the same should be taken in the demanded state before one competent to administer an oath in such state.

It may be urged that it would ordinarily be a matter of inconvenience to the demanding state to be obliged to submit affidavits taken in the demanded state, as in some instances it might compel the witnesses to go from one state to the other to make the affidavit or affidavits in question.

Does that involve greater inconvenience to the prosecution than its opposite imposes on relator, viz.: his arrest and exile from the demanded state on evidence which, if ever so false, and so proved, does not subject affiants to any punishment in the state in which the evidence is offered?

No citizen should be arrested and exiled from a state on evidence which does not carry with it in such state the penal consequence of false swearing.

In the case of *ex parte* Hart, 63 Federal Reporter, the court did not consider the question of convenience in deciding that relator could not be held in an extradition proceeding based not on "indictment" but on "information."

Neither *ex parte* Reggel, 114 U. S. 642, nor *Roberts* v. *Reilly*, 116, 80, is an authority to the point that a foreign affidavit is competent evidence before the demanded governor, because in neither case was that precise question raised, viz.: the competency of a foreign affidavit, nor was it considered in the published opinions.

If, however, the contrary is true, the doctrine would not apply to the case at bar, because here we have no foreign affidavit made for use in this proceeding, but only what purports to be evidence in the form of a copy that an affidavit was made for some purpose in the demanding state, but whether used for any purpose does not appear except by inference, neither does it appear that the copy is a true copy of the original, nor that Wardwell, before whom the original purported to be executed, was a justice of the peace and so authorized to administer oaths.

To sum up the matter, the objections to the competency of the evidence, laid before Governor Jordan, are as follows:

First. There is no state or national statute providing for the authentication of a *copy* of a foreign affidavit and making it evidence in a case like this.

Second. If there were, it would not avail here because no authentication of any kind existed as to the copy offered and accepted in evidence.

Third. Because as the original was executed in a foreign state affiant was not liable to the law of the state in which the copy was offered.

Fourth. Because the acceptance of the *copy* as evidence

could not possibly subject affiant in *any state* to the penal consequences of false swearing; the use of *copies* of a foreign affidavit in a judicial proceeding or *quasi* judicial proceeding is not evidence under oath within the meaning of the law pertaining to the crime of perjury.

Fifth. The copy was secondary evidence and no reason was assigned why its original was not produced.

Sixth. The certificate of George A. Sanderson was not under oath and his signature to the certificate was not vertified.

Seventh. The indictment containing the charge of crime could not be received as evidence of its own allegations. In other words, it could not prove itself, and if it could, the commission of the crime did not necessarily imply the presence of relator at the time and place of the alleged offense, since "uttering a forged will" is a crime which does not require personal presence in a state in order to its commission.

II.

It Was Error in Law to Hold that the Refusal of the Governor to Hear Your Relator at the Time and Under the Circumstances in Which She Appeared Before Him, Was "Due Process of Law" and Deprived Her of no Legal Right.

In treating of the writ of *habeas corpus* in interstate extradition, Spear, in the first edition of his work on extradition, page 340, expresses himself as follows:

"The delivering executive, who issues his warrant for the arrest and delivery of any accused party, should always direct that before his actual delivery to the agent of another state or territory he should have a reasonable opportunity to apply for a writ of *habeas corpus*, to the end that he may assert his legal rights before a court of justice, and be discharged from custody if the proceedings against him shall be proved illegal.

"This is required by the law of Massachusetts, and whether required or not by statute law, every executive should see to it that the party arrested under his order is not cheated out of his privilege by the summary manner of his removal.

"That privilege is a right guaranteed to him by the common law of the country."

Anderson's *Dictionary of Law*, under the head of "Habeas Corpus," has the following:

"It is a new suit brought by him to enforce a right, which he

claims, as against those who are holding him in custody under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds, he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. It is of a wholly civil nature."

In the exercise of this right relator petitioned for this writ, alleging that she was illegally restrained of her liberty.

To determine this question the Court, before whom the *habeas corpus* proceedings were instituted, sat as a court of review, and upon the evidence should have discharged this relator on the motion made for that purpose, because it appeared that no *legal finding* was made that relator was a fugitive from justice. Such *legal* finding was a *condition precedent* to the issue of the warrant.

A finding, made in the teeth of a refusal to grant your relator a hearing on the question whether she was a fugitive from justice, could not in the nature of things be a legal finding nor justify the issue of the rendition warrant.

When relator, claiming he is not a fugitive from justice and asking to be heard and to offer evidence in his own behalf, appears before the governor, the hearing must be granted in order that the governor may properly perform his "judicial duty."

If such appearance did not entitled him to a hearing he would not be entitled to one subsequently on *habeas corpus* proceeding, as the sole object of the latter proceeding is to *vindicate* a right of which relator has been *deprived*, not to enforce one of which he has *not* been deprived.

The proper performance of a judicial duty involves in its very nature the granting of a hearing to all interested who appear and ask to be heard.

In the case at bar the governor was about to enter upon the discharge of a judicial duty which might result in a finding which would deprive this relator of her liberty, yet he declined to hear her, refused to consider any evidence except that contained in the requisiton papers furnished by the demanding state, made his finding against her and on that finding so made based his rendition warrant.

How is it possible to consider such a finding a judicial finding, or to support a warrant based thereon?

The rendition warrant cannot stand differently than if the law had made it the duty of the secretary of state to issue it after the governor had filed with him his finding in the case.

In speaking of the warrant the Supreme Court of New Hampshire says:

"It was also expressly provided in the rendition warrant that she should be afforded an opportunity to sue out a writ of *habeas corpus* before being delivered over to the Massachusetts authorities."

But the warrant cannot find support from the fact that it contained a command to afford relator such opportunity to sue out a writ of *habeas corpus* as the laws of the state prescribed.

She had a common law and statutory right to sue out this writ and the said warrant simply recognized it.

The petition of relator could not affect the warrant. It was simply a step in the direction of her discharge in case the warrant was not based on a legal finding.

As shown in printed record, page 27, relator was arrested on the warrant March fourth, petitioned for a writ of *habeas corpus* on the fifth, which was granted on the eighth, and hearing occurred on the fifteenth.

The question is, Was she illegally arrested on the fourth and illegally restrained of her liberty thereafter?

In other words, was the arrest of this relator on a process issued after a refusal to hear her, on a question which involved the discharge of a judicial duty on the one hand and the liberty of this relator on the other, "due process of law" as that term is used in Articles 5 and 14 of the amendments to the Constitution of the United States?

It is urged by the Supreme Court of New Hampshire that the refusal of the governor to hear this relator infringed no legal right possessed by her, and in support of this proposition Justice Bingham uses the following language:

"If the relator had the right not to be removed from the state without a judicial trial, the issuing of the warrant for her arrest did not conclude her right in this respect. Under the law of this state she could sue out a writ of *habeas corpus* and test the question whether she was a fugitive from justice; and if it were made to appear to the court that the finding of the governor on this question was erroneous, she would be entitled to her discharge. *State* v. *Clough*, 71 N. H. 594, 600, 601."

The fallacy of above consists in the assumption that making it "appear to the court that the finding of the governor on this question was erroneous 'constitutes' a 'judicial trial.'"

Proving in a court of justice that an *ex parte* finding made by the governor that one is a "fugitive from justice" is an erroneous finding of fact is a *review* of the finding so made in room of

a "judicial trial." The privilege of proving that an *ex parte* judgment rendered against one is a wrong judgment, is not such a "judicial trial" as the common law contemplates.

Was it "due process of law" to compel relator to submit to an *ex parte* finding against her, to arrest, and to the expense of employing counsel to sue out a writ of *habeas corpus*, and to detention in custody from March fourth, A. D. 1902, to March fifteenth in order to be heard?

Was it "due process of law" to compel relator to submit to a finding based on a rejection of the evidence offered by her and a consideration of only such evidence as was offered against her? A finding which she must subsequently, after arrest, delay and expense, meet in a court of law as a judgment against her, or be exiled from the state.

Again, if relator had a legal right in a court of law to review a finding made against her, why had she not a right to be heard where the original finding was made?

Which is the more essential to relator, a mere right to review a finding, or to be heard when the finding is made?

Let us see what the Supreme Court of New Hampshire says as to the right of relator to be heard at such "finding":

"The relator contends that the warrant upon which she was arrested was illegally issued, because she was not permitted to be heard before the governor upon the question whether she was a fugitive from justice, and assigns this as a reason why she should be discharged from arrest.

"It was a question of fact to be determined in the first instance by the governor, whether the relator was a fugitive from justice (in *re* Cook, 49 Fed. R. 833, 838); but she was then not entitled as of right to be heard. It was discretionary with the governor to grant or deny her request.

* * * * * * *

"While the presence of the relator at the hearing obviated the usual objection to giving the accused notice, yet her presence did not create a legal right to be heard, and no such right previously existed."

One can search above language in vain for an answer to the question as to why accused had not a right to be heard when Governor Jordan performed his judicial duty of determining in the first instance whether she was a fugitive from justice. The Court contents itself with stating the proposition that she had no right to be heard and gives no reason therefor.

The Court does suggest in the opinion, as witness prior quotation, that if relator had a legal right to be heard she obtained

that right in the suit begun by her to obtain her liberty; but that is no answer to her claim that she had a right to be heard at the finding which deprived her of her liberty. The fact that in her suit she had a right to disprove said finding by rebutting evidence offers no reason why she should not have been heard before the governor when he made this finding, nor why she should suffer the indignity of imprisonment and the delay and expense of a suit in order to introduce her rebutting evidence.

As has already been seen, the warrant of arrest provided in substance that she should be given an opportunity to bring her suit before delivery to Massachusetts authorities. She availed herself of this privilege, but instead of introducing evidence rebutting that on which the governor based his finding, she contented herself with showing the character of the evidence admitted by him, also that he refused to hear her and then asked to be discharged on the ground that the finding on which he based his warrant was not a legal finding.

It is obvious that if relator had proceeded to introduce rebutting evidence she would have waived her objections to the finding of the governor, objections based on his refusal to hear her, and on the incompetent evidence received by him; hence when the court *ordered* her to introduce such rebutting evidence she could only point out that such action would constitute a waiver of her objections to the finding of the governor, on which she relied for her discharge; and when the court then *directed* that she state whether she waived her right to then, or at any future time, put in such evidence, she found the court intended her to make an election as to which course she should pursue, which she did.

In speaking of her action in this particular, Justice Bingham says:

"In the trial before the Superior Court she declined, and expressly waived, the right to then, or at any future time, offer evidence showing that she was not a fugitive from justice, and contented herself with submitting the record evidence presented to the governor and causing it to appear that she had been denied a hearing before him.

"As the relator was entitled, in the trial before the Superior Court, to review the action of the governor, and be discharged, if his finding upon this question of fact was erroneous, or if there was no evidence from which he was warranted in making the finding, we are unable to see wherein she has been deprived of any right to be heard to which she was legally entitled."

If this relator had no legal right to be heard before the gov-

ernor, it is evident that she has not been deprived of any right to be heard to which she was legally entitled, but we demur to the doctrine that she had no right to be heard before the governor.

The refusal of the governor to hear her deprived her of a judicial trial, and resulted in her imprisonment.

The fact that she had a right to bring this suit did not alter his action in the premises nor, *if* such action was legal, save her from the necessity of proving in a court of law that she was *not* a "fugitive from justice."

It is an essential part of every "judicial trial" that the person charged shall not be required to prove his innocence.

The action of the governor deprived this relator of an important right, viz.: that of compelling the demanding state to maintain the affirmative of the issue that she was a "fugitive from justice."

While the Supreme Court of New Hampshire assigns no direct reason for the doctrine that relator had no legal right to be heard before the governor, it does so by inference, in the following language:

"It is not the practice in such proceedings to give the accused notice before the rendition warrant is issued, and the act of Congress and the statutes of this state do not contain a provision requiring that she should be notified.

"The reason for the omission of such a provision is apparant, —if notice were required, the practical operation of the law would be nugatory and its purpose defeated. It is an *ex parte* proceeding, and necessarily so. *In re* Cook, *supra*, 838."

The necessary inference from the foregoing is that as relator had no right to notice, she had no right to be heard.

We contend that the right to be heard does not turn on the right to notice, but the right to notice on the right to be heard.

The lack of the right to be heard carries with it the lack of right to notice, but the lack of the right to notice does not necessarily carry with it the lack of right to be heard.

If the right to be heard in this case was extinguished by the lack of right to notice, how could this relator obtain a hearing by means of her suit?

In other words, how could she obtain, by means of a new suit, what she was not entitled to have in the first instance?

Because a man is not entitled to notice, it does not necessarily follow that his right to be heard is extinguished.

If a substantial reason exists for not giving notice, the right to be heard may still continue, so that if, as in the case at bar,

relator appears without notice, and insists on his right to be heard, it must be granted.

If relator has a right to a writ of *habeas corpus*, in order to enable him to exercise his constitutional right to be heard, of which exercise he has been deprived through *lack of notice*, it necessarily follows that when he appears *without notice* before the governor, at the proper time, to then deny his request to be heard is as much a denial of his constitutional right as to deny him the writ of *habeas corpus*.

It must not be forgotten that in an extradition proceeding the hearing before the governor, which precedes the warrant, is for the purpose of establishing the truth of the charge that relator is a "fugitive from justice," and the warrant is *final* process to carry such finding into effect; therefore if relator had no legal or constitutional right to be heard on that question before the governor, it is very difficult to understand how he could bring and maintain a suit to be heard later in court on that question.

But if he had such right before the governor, and for any good reason, by lack of right to notice or in any other manner was deprived of the opportunity to exercise it, then it is clear how and why he could bring a *habeas corpus* suit and exercise that right, under such limitations as the nature of the legal situation imposed upon him.

Sections 1, 2, and 3, Chapter 263, Pub. Statutes of this state provide for securing the person of relator in anticipation of action by the demanding state under the provisions of Chapter 5278, Revised Statutes of the United States. In view of this law we quote from page 24 of the printed record of this case, as follows:

"At the adjourned hearing the relator, subject to the defendant's exception, introduced evidence from which it appeared that the relator was arrested March 3, 1902, by the sheriff of Merrimack county, upon a complaint and warrant, under Sections 1 and 2, Chapter 263, of the Public Statutes, charging her with uttering forged wills and being a fugitive from justice.

"The requisition papers were filed with the secretary of state March 3, and on March 4 were laid before the governor, when counsel for the relator appeared before the governor and stated that they desired a hearing before him."

It appears from above that this relator, under the extradition law of New Hampshire, was given notice of this proceeding, and her person secured in anticipation of a continuation of the extradition proceeding before the governor and, because of this notice and arrest under the statutes, was there represented by

counsel, hence accused was actually notified under the statutes, was present at the hearing and was within her rights in asking to be heard, and the warrant which issued in defiance of such right was illegally issued and your relator is entitled to her discharge.

Hovey *v.* Elliott, 167 U. S. 409.
Roller *v.* Holly, 176 U. S. 398, 409.

UNDER THE ORGANIC AND STATUTORY LAW OF THE UNITED STATES YOUR RELATOR WAS ILLEGALLY RESTRAINED OF HER LIBERTY AND THE RENDERING OF JUDGMENT AGAINST HER VIOLATED HER CONSTITUTIONAL RIGHTS.

Under the decision of the Supreme Court of New Hampshire, when this relator appeared before Governor Jordan at the moment he was about to determine the question whether she was a "fugitive from justice," and asked to be heard, she had no legal right to have her request granted, and in refusing it, considering only the evidence offered against her, making his finding and issuing his warrant for her arrest, he violated none of her rights.

The above decision and the judgment of the Superior Court of New Hampshire based thereon, was the culmination of a continued violation of the legal right of your relator to personal liberty. The character of such violation of her personal liberty as this relator has suffered is forbidden, not only by such express constitutional provisions as appear in Sections 5 and 14 of the amendments to the Constitution of the United States, and Article 15 of the bill of rights for the State of New Hampshire, but by the fundamental principles of justice and of human liberty which inhere in an unwritten as well as a written constitution.

Even this decision recognizes relator's right to a writ of *habeas corpus* as a means and mode of asserting her right to a hearing in the court on the question of whether she was a fugitive from justice, and so is inconsistent with itself, because relator could have no right to be heard in court if she had none before the governor; her right to be heard there must be the foundation of her right to be heard in court; having lost her opportunity there through the illegal action of the governor she could rely upon it in court as a ground for discharge, or she could waive the usury and rebut his finding by rebutting evidence. She elected the former and the reasons assigned for the refusal to discharge is that the action of the governor was not illegal because relator was not entitled to notice to appear before him; as if her right

to a hearing necessarily depended on her right to notice, even when she was actually present and had been given actual notice in the most unpleasant manner possible.

It is true that ordinarily right to notice and to a hearing go hand in hand, but the former is an incident of the latter and if for any reason the two are divorced the principal may exist though the incident be extinguished.

In the absence of action to secure the person of relator under Section 1, Chapter 263, Public Statutes, Governor Jordan would not have been required to give her notice of the proposed rendition hearing before him, for fear she might make a wrong use of it by leaving the state, but his finding against her at such hearing would still have been a judgment in effect, and under the circumstances would have supported the rendition warrant. Nevertheless, as she still had a right to be heard, notwithstanding lack of notice, she could have begun her suit by writ of *habeas corpus*, and obtained it in court. The fact that such hearing would be a mere *review* of the judgment or finding of the governor, would be one of the limitations of the legal situation for which no one would be in fault. She would still have all her legal rights secured to her, of which the nature of the legal situation permitted, but as in this case action was taken under said section of the statute, and the person of this relator secured and she appeared in season and asked the governor to hear her. The entire legal situation was altered and her request should have been granted, and its denial rendered the governor's finding illegal and the warrant based thereon invalid.

The constitutional principles applicable to the preservation of personal liberty should be at least as strenuously applied when there is occasion therefor, as in the case of right to property; that it may be seen that the New Hampshire court has not been remiss in the latter particular and because the discussions of the court throw light on the principle involved herein.

We cite the following cases:

East Kingston v. *Darius Towle*, 48 N. H. 57, 60, 61, 62.
Opinion of the Justices, 66 N. H. 629, 632, 633.
Carter v. *Colby*, 71 N. H. 230, 231.
State v. *Jackman*, 69 N. H. 318, 330.

EDWARD A. LANE.